(235-C)

NOV 29 197

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-791

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants,

and

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS NYQUIST, LEVITT AND GALLMAN

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellants
Nyquist, Levitt and Gallman
The Capitol
Albany, New York 12224
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	3
Statute Involved	4
Questions Presented	6
Statement of the Case	7
The Questions are Substantial	9
Conclusion	20
Appendix A—Majority Opinion	A1
Appendix B—Dissenting Opinion	A39
Appendix C—Final Judgment Appealed From	A44
Appendix D—Notice of Appeal	A50
Appendix E—Chapter 414 of the New York Laws of 1972	A53

CONSTITUTION.

United States Constitution, Amendment One .2, 3, 6, 7, 8, 10

STATUTE CITATIONS.

20 United States Code, § 425 (Federal Higher Education Act of 1965, Title IV) 5, 11
28 United States Code, § 2281 3
28 United States Code, § 2284 3
28 United States Code, § 1253 4
New York Education Law, McKinney's Consol. Laws, Article 12 .....4, 10
New York Education Law, McKinney's Consol. Laws, Article 12-A 6, 16, 17, 19
New York Tax Law, McKinney's Consol. Laws, § 612 (j) 5
New York Laws of 1972, chapter 414 .....2, 3, 4, 5, 7, 10

II.

CASE CITATIONS.

	PAGE
Board of Education v. *Allen*, 392 U. S. 236	4, 9, 19
Boddie v. *Connecticut*, 401 U. S. 371	18
City of El Paso v. *Simmons*, 379 U. S. 497	13
Essex v. *Wolman*, 342 F. Supp. 399, affd. ____ U. S. ____ (Oct. 10, 1972)	9, 16
Everson v. *Board of Education*, 330 U. S. 1	9, 13, 14
Flast v. *Cohen*, 392 U. S. 83	4
Harper v. *Virginia State Board of Elections*, 383 U. S. 663	18
Jacobson v. *Massachusetts*, 197 U. S. 11	12
Lemon v. *Kurtzman*, 403 U. S. 602	4, 7, 9, 15
Lemon v. *Sloan*, 340 F. Supp. 1356	16
Levitt v. *Committee for Public Education and Religious Liberty*, probable juris. noted 11/6/72	4
Pierce v. *Society of Sisters*, 268 U. S. 510	17
Sherbert v. *Verner*, 374 U. S. 398	19
Tilton v. *Richardson*, 403 U. S. 672	4, 7, 9, 12, 15
Walz v. *State Tax Commission*, 397 U. S. 664	7

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR., and ADAMINA RUIZ,

Intervenor-Appellants,

and

EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWAN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellees.

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS NYQUIST, LEVITT AND GALLMAN

Pursuant to Rules 13 (2) and 15 of the Rules of the Supreme Court of the United States, the appellants Ewald B. Nyquist, Arthur Levitt and Norman Gallman file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The opinion of the majority of the Judges in this case, sitting as a statutory Court of three Judges, written by the Hon. Murray I. Gurfein, Judge of the United States District Court for the Southern District of New York, and concurred in by the Hon. John M. Cannella, Judge of the United States District Court for the Southern District of New York, sustained the complaint in part, holding sections 1 and 2 of chapter 414 of the New York Laws of 1972 to be unconstitutional, as being in violation of the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoined the further implementation by defendants Nyquist and Levitt of those sections of the statute which provide for payment of State funds to nonpublic schools for repairs and maintenance and for payment of State funds to partially reimburse tuition paid by low-income parents of nonpublic school pupils. The majority of the Court held that sections 3, 4, and 5 of chapter 414, which provide for an adjustment of gross income for State income tax purposes for parents paying tuition to nonpublic schools does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. The Hon. Paul R. Hays, Associate Judge of the United States Court of Appeals for the Second Circuit, dissented in a separate opinion from so much of the decision as held that sections 3, 4 and 5 of chapter 414 of the New York Laws of 1972 are not unconstitutional. The majority opinion, the dissenting opinion and the final judgment appealed from are set out in the Appendix hereto and marked as Appendix "A", "B", and "C" respectively. There are as yet no citations to these opinion.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, §§ 2281 and 2284. The judgment holds sections 1 and 2 of chapter 414 of the New York Laws of 1972 to be unconstitutional on the ground that they violate the Establishment Clause of the First Amendment to the Constitution of the United States and enjoins the defendants from making any payments from State funds for reimbursement of moneys expended by nonpublic schools for maintenance and repair or for reimbursement of any tuition payments made to nonpublic schools by low-income parents of children enrolled in such schools. The judgment held sections 3, 4, and 5 of chapter 414 of the New York Laws of 1972 to be constitutional and not in violation of the Establishment Clause of the First Amendment to the Constitution of the United States; those sections provide for adjustments of gross taxable income, for New York State income tax purposes, to parents of children enrolled in nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against implementation of sections 1, 2, 3, 4, and 5 chapter 414 of the New York Laws of 1972, alleging that those provisions of the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as reimbursement for expenses of repair and maintenance, by partially reimbursing parents of low income for tuition paid on behalf of their children to nonpublic schools, and by providing for adjustments of gross taxable income for New York State tax purposes to parents paying tuition to nonpublic schools on behalf of their children.

The final judgment, granting the relief sought in the complaint as to sections 1 and 2 of chapter 414 and denying relief as to sections 3, 4, and 5 of that chapter, was made and entered October 20, 1972. Notice of Appeal on behalf of defendants Nyquist, Levitt, and Gallman was filed on November 8, 1972 in the United States District Court for the Southern District of New York (a copy of which is made Appendix "D" hereto). Notices of appeal were also filed on behalf of intervenor-defendant parents of children enrolled in nonpublic schools and by intervenor-defendant Brydges from that part of the judgment which holds section 2 of chapter 414 to be unconstitutional and by the plaintiffs from that part of the judgment which holds sections 3, 4, and 5 to be constitutional.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, § 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast* v. *Cohen,* 392 U. S. 83 (1968); *Board of Education* v. *Allen,* 392 U. S. 236 (1968); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty,* probable jurisdiction noted November 6, 1972.

Statute Involved

Chapter 414 of the New York Laws of 1972 is summarized herein as pertinent to this appeal (the full text is set out as Appendix "E" to this statement).

Section 1 of chapter 414 adds a new Article 12 to the New York Education Law (McKinney's Consolidated Laws of New York), providing for health and safety grants to

nonpublic schools. The grants would be payable only to nonpublic schools which have been certified under Title IV of the Federal Higher Education Act of 1965 as serving a high concentration of pupils from low-income families. The grants, in the amount of $30 per pupil plus an additional $10 per pupil attending school in a building constructed prior to 1947, would be payable for maintenance and repair of the nonpublic schools. The New York Legislature specifically found, in enacting this legislation, that these grants are necessary to protect the health, safety and welfare of children attending nonpublic schools, particularly in those where the financial resources of the parents are not sufficient to adequately maintain the structures.

Section 2 of chapter 414 adds a new Article 12-A to the New York Education Law, providing an equal educational opportunity program. This Article provides for the reimbursement of parents, with a gross annual of income of less than $5,000, for not more than 50% of the cost of tuition paid to a nonpublic school on behalf of their children. In so doing, the Legislature specifically found that the constitutionally guaranteed right of parents to select a nonpublic school education for their children is diminished or effectively denied to parents of low income who are unable to afford the tuition necessary to select such an education. In accordance with the State's established policy of providing for the economic and constitutional necessities of parents of low income, the New York Legislature enacted this article which provides for the reimbursement of a portion of the tuition paid by such parents.

The third portion of the statute which was challenged in the action but is not relevant to the appeal by these appellants, added a new subsection j to section 612 of the New York Tax Law, affording a modification of "gross taxable

income" to parents who pay nonpublic school tuition. The parents' gross taxable income would be reduced by a fixed amount per child attending a nonpublic school, based on a sliding scale under which parents with the lowest incomes receive the highest amount of modification of income. Parents who claim tuition reimbursement pursuant to Article 12-A of the Education Law would not also be entitled to claim the modification of gross income here provided.

Questions Presented

1. Do grants to nonpublic schools for maintenance, repair and physical operation of those schools, in the exercise of the State's police power and for the purpose of protecting the health and safety of the children attending those schools, constitute an establishment of religion in violation of the First Amendment to the Constitution of the United States?

2. Are the health and safety grants, so provided, a neutral form of aid similar to those forms of aid to nonpublic schools which have previously been approved by this Court?

3. Does the partial reimbursement of tuition paid by low-income parents to nonpublic schools on behalf of their children constitute a valid State expenditure for the purpose of guaranteeing to persons of low-income the exercise of their constitutionally protected right to select a nonpublic school education for their children or for the purpose of fulfilling the State's obligation to provide for the necessities of life and for access to constitutional rights to persons of low income?

Statement of the Case

Plaintiffs commenced this action seeking to have sections 1, 2, 3, 4, and 5 of chapter 414 of the New York Laws of 1972 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 and 2 of the act and restraining the implementation of sections 3, 4, and 5 of the act.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be beneficiaries of the challenged provisions of the act. The motion was granted.

A motion to intervene was also made by Earl W. Brydges, the Majority Leader and President Pro Tem of the New York State Senate. That motion was also granted.

The District Court, in its decision, specifically held that it accepted the findings of the Legislature as to the purposes of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas, and with the assumption that the Legislature intended to provide a quality education for all children and to preserve a pluralistic society by providing money to poor parents for tuition in nonpublic schools. Relying primarily upon the recent decisions of this Court in *Lemon* v. *Kurtzman, supra; Tilton* v. *Richardson, supra;* and *Walz* v. *State Tax Commission* (397 U. S. 664 [1970]),

the Court held that public moneys may not be used for the repair or maintenance of nonpublic school buildings in which the religious and secular functions are combined. In response to the argument that repair and maintenance are neutral in character, not sectarian, the Court rejected the contention that nonpublic school budgets are divisible and held that subsidies of public moneys, even for secular purposes, lighten sectarian school budgets and make possible the diversions, to religious purposes, of funds which the schools would otherwise have had to expend for the upkeep of the physical plants of the schools. This latter result, the Court found, rendered the statute in violation of the First Amendment to the Constitution of the United States. The Court also found that any money payment to the schools was a relationship "pregnant with involvement" and invited excessive entanglement between government and religion. While the Court accepted the argument that the statute was an exercise of the police power of the State, it held that that could not validate the statute where it was found to violate a provision of the Federal Constitution.

As to section 2 of the State statute, the Court found that the parents receiving the money were only conduits for the payment of the money to the nonpublic schools in the form of tuition. Recognizing the poor should have equal rights with the rich to practice their religions and that the conditions of rich and poor should be equalized before the law, the Court nevertheless held that the support of religious schools should be the responsibility of the particular religious denomination, not the State. Nor did the Court find any support for the statute in the potential effect upon public education if nonpublic schools were to close in substantial numbers because of financial difficulties. The Court

expressed a belief that support of nonpublic schools in any degree, based on such an argument, could lead to complete support of sectarian education.

The dissenting Circuit Judge (HAYS, J.) disagreed with the majority only as to those provisions of the statute providing for a modification of gross taxable income and concurred with the majority in their findings as to sections 1 and 2 of the act.

The Questions are Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may constitutionally be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transporation may be provided to children attending sectarian schools (*Everson* v. *Board of Education*, 330 U.S. 1 [1947]); that textbooks may be provided to children attending church-related schools (*Board of Education* v. *Allen*, 392 U. S. 236 [1968]); that public moneys may be spent for the construction of academic buildings at church-related colleges (*Tilton* v. *Richardson*, 403 U. S. 672 [1971]); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries (*Lemon* v. *Kurtzman*, 403 U. S. 602 [1971]), nor may payments be made for reimbursement of tuition paid by *all* parents of children attending nonpublic schools (*Essex* v. *Wolman*, ___ U. S. ___ [Oct. 10, 1972], affg. 342 F. Supp. 399).

None of those cases have involved the precise questions here at issue. Those questions are, first, whether the State may, in the exercise of its police power for the protection of the health, safety and welfare of children attending nonpublic schools in the State, make grants of public moneys to the nonpublic schools for the purposes of repair, main-

tenance and operation of the physical plant of the schools, as opposed to expenditures for the educational function of the schools. Secondly, this case presents the question of whether the State may, in an effort to secure to low income parents the ability to exercise their constitutional right to select a nonpublic school education for their children, reimburse those parents for a portion of the tuition paid to nonpublic schools.

This Court has never ruled upon whether the State may expend money for police power purposes to protect the structural integrity of buildings used by children; nor has the Court ever ruled on whether the State may expend money for the purpose of assuring to low income citizens the financial ability to exercise constitutional rights under the First Amendment.

A.

New Article 12 of the New York Education Law (added by section 1 of Chapter 414), which provides health, welfare and safety grants to nonpublic schools for maintenance, repair and physical operation of those schools, was enacted for the express purpose of protecting the health and safety of children attending those schools. In enacting that Article, the New York Legislature specifically made a finding in the statute that the State has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools. It recognized that that objective is met in the case of public school children through grants of State aid and through municipal taxing power. The Legislature further specifically found that the fiscal crisis in nonpublic education has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of children attending those schools, particularly in urban areas; that nonpublic schools

in low income areas are characterized by deteriorating physical structures; and that the parents of children enrolled in those nonpublic schools do not have the financial resources necessary to adequately maintain the structures. These specific factual findings the District Court held were to be accepted as true, particularly as indicating that the Legislature's intent in enacting the statute was secular in nature. The New York Legislature concluded from its factual findings that the State has the right and obligation to ensure that the physical environment in nonpublic schools in those low income areas is both heathful and safe. To the extent that this finding represented a conclusion of constitutional law, the District Court found that it was not bound to accept it.

In order to meet the objective of safe and healthful buildings for nonpublic school children, the Legislature has provided in this statute for grants for maintenance, repair and operation of buildings. Those grants amount to a maximum of $30 per pupil, increased by an additional $10 per pupil attending classes in a building constructed prior to 1947. The grants are limited to not more than 50% of the average statewide per pupil cost of maintenance and repair in public schools, and may not exceed the amount actually expended by the nonpublic school for maintenance, repair and operation in the preceding base year, as certified by a required audited statement of expenditures.

Not all nonpublic schools in New York State will qualify for grants under this act. Only those schools will qualify which have been certified as serving a high concentration of low income pupils for the purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C., § 425).*

* Title IV of the Federal Higher Education Act of 1965 provides that a portion of moneys borrowed by students to secure college education will be forgiven to any borrower who teaches in a school serving a high concentration of children from low income families.

Thus, only a small percentage of the total number of nonpublic schools will be eligible for these grants (less than 25% of the total number of nonpublic schools in the State of New York).

The District Court in this case held that, although it accepted the intention of the New York Legislature as being essentially secular and within the police power of the State, the effect of Section 1 of the statute would be to advance religion and the statute, therefore, would be unconstitutional. In so holding, the Court based its findings upon conclusions that no public moneys may ever be spent to support sectarian institutions, in whole or in part; that the statute makes no distinction between parts of school buildings in which secular or sectarian subjects are taught; that the budgets for sectarian institutions are not constitutionally separable so as to ascribe a percentage of their total neutral functions; that the only neutral services which may be afforded to pupils attending sectarian institutions are those which are equally afforded to students in both public and nonpublic schools; and that the provision of continuing allowances for maintenance and repair involve "continuing financial" and political "relationships [and] dependencies" in the language of this Court in the *Tilton* case, *supra* (403 U. S. at 688).

The issue here, therefore, is a substantial one, embracing the question of the extent of the State's police power where there may also be involved incidental aid to religious institutions.

In *Jacobson* v. *Massachusetts* (197 U. S. 11 [1905]), Mr. Justice HARLAN discussed the extent of the State's police power, observing (pp. 24-25):

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender

> when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, *yet it has distinctly recognized the authority of a State to enact* quarantine laws and *'health laws of every description;'* indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (Emphasis added.)

And in *City of El Paso* v. *Simmons* (379 U. S. 497 [1965]), this Court again clearly expressed the broad powers of state legislatures in police power legislation, holding (p. 508):

> "The State has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of the State, we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.' "

While the cases above cited dealt with statutes different in specific scope and purpose from the statute here at issue, they are all alike in one respect, that is, they deal with questions of public health and safety and the extent of the State's police power. Here too, there is a distinction that in those cases the questions were of restrictive regulation, rather than the expenditure of public funds. However, there is no essential difference in the scope of the police power between police power legislation which restricts and police power legislation which expends money to accomplish a health and safety objective.

This identity of result was recognized by this Court in *Everson* (*Everson* v. *Board of Education*, 330 U. S. 1 [1947]). In that case, the Court approved the expenditure

of public funds to provide school bus transportation for children attending nonpublic schools, in part at least, as an exercise of the State's police power. In considering whether the providing of bus transportation served a valid secular purpose, this Court stated (p. 7):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose * * *. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'."

Again, with reference to the purpose of the New Jersey legislation there at issue, this Court stated (p. 18):

> "Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

It would be an anomaly if the State could provide for the safety of children in reaching the doors of the nonpublic schools but could not guard them against hazards to their health and safety once they enter those doors.

Since the Court below accepted the Legislature's findings that section 1 of the statute here involved is a police power measure, designed to protect the health and safety of children attending nonpublic schools, and, since the State's police power is a reserved power of the states, this case presents a very substantial question as to the extent of a state's power under those reserved powers and of the balancing of those reserved powers against provisions of the Federal Constitution.

This, we submit, is an issue which has not previously been dealt with by this Court and is so substantial as to warrant consideration and resolution.

B.

In *Tilton* v. *Richardson, supra,* this Court approved the expenditure of Federal funds for the construction of academic buildings at church-related colleges. In that case, the Court observed that "The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides." In *Lemon* v. *Kurtzman, supra,* this Court also stated (403 U. S., pp. 616-617):

> "Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

And again, in *Tilton,* this Court rejected any theory that all financial aid to sectarian institutions was constitutionally prohibited, stating (p. 679):

> "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Brandfield* v. *Roberts,* 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all give aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld."

In the instant case, the aid involved is secular, neutral and nonideological. It provides for a portion of the cost

of repair and maintenance of school buildings in areas which serve a high concentration of low income pupils, where presumably the parents of those children are unable to bear the cost of maintenance and repair, particularly of older structures.

This Court has not previously considered the question of whether the provision of building maintenance aid in general, or limited to schools serving low income areas, is a neutral, non-ideological aid to nonpublic schools which is permitted under the Establishment Clause. This question, we submit, is substantial and warrants the consideration and resolution by this Court.

C.

New Article 12-A, added to the New York Education Law by section 2 of the statute here at issue, provides for the reimbursement by the State of a portion of the tuition paid to nonpublic schools by parents whose State net taxable income is less than $5,000 per year. Tuition reimbursement will be paid in an amount equal to the lesser of 50% of tuition paid or $5 per month per pupil attending elementary school and $10 per month per pupil attending a secondary school. Thus, the maximum amount of reimbursement payable on behalf of a child is $50 for an elementary school pupil or $100 for a secondary school pupil.

Initially, it must be noted here that this statute differs in one significant respect from the statutes at issue in the *Wolman* and *Lemon* cases (*Wolman* v. *Essex*, 342 F. Supp. 399 [S. D. Ohio, April, 1972], aff'd. ____ U. S. ____ [Oct. 10, 1972]; *Lemon* v. *Sloan*, 340 F. Supp. 1356 [E. D. Pa., 1972]). In those cases, the statutes of Ohio and Pennsylvania, which were at issue there, provided

tuition reimbursement to *all* parents of children attending nonpublic schools, whereas the New York statute here provides for reimbursement *only* to low income parents. This distinction, and the legislative findings in support of the statute, are, we submit, decisive in support of the constitutionality of this statute and raise questions sufficiently substantial to warrant the full consideration of this Court.

In enacting Article 12-A, the Legislature of the State of New York specifically recognized that parents have a constitutional right to satisfy a State's compulsory attendance laws by selecting either a public or nonpublic school education for their children, including a sectarian education. The Legislature further found that that constitutional right is diminished or even denied to children of lower income families; and that the State has a right to make provision so that such families and their children are not excluded from the exercise of that constitutional right of selection because of their inability to pay the cost of a nonpublic school education.

Article 12-A is the State's attempt to meet that objective of assuring that its citizens are not excluded from constitutionally secured rights solely because of inability to meet the costs of those rights.

The New York Legislature's findings in relation to constitutional rights and obligations were not carved out of thin air. They have a solid foundation in the decisions of this Court.

In *Pierce* v. *Society of Sisters* (268 U. S. 510 [1925]), this Court held that a State may not require all children to attend public schools, and that parents have a constitutionally guaranteed right to satisfy a State's compulsory

attendance laws by selecting either a public or nonpublic education, including a sectarian education.

This Court has also held that a person's access to the exercise of a constitutional right cannot be denied or withheld because of his inability to pay for the exercise of that right (see, *e.g.*, *Boddie* v. *Connecticut*, 401 U. S. 371 [1971]; *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 [1966]).

In *Boddie*, in which this Court held that access to the judicial process could not be denied to persons unable to pay court costs, Mr. Justice DOUGLAS in his concurring opinion stated (p. 383):

> "'Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.'"

In *Harper*, this Court invalidated a poll tax as a condition precedent to the exercise of the right to vote, holding that the elective franchise may not be withheld because of a voter's inability to pay a poll tax.

Additionally, both the State and Federal governments have recognized a responsibility toward the support of indigents, both as to the necessities of life and access to constitutional rights. The social services system itself is a recognition of that responsibility, as is the provision of free legal counsel to indigents in both civil and criminal cases, and as are free health care, the school lunch program, and similar programs and services.

New York's provision for partial tuition reimbursement is reasonably calculated to enable low income parents to secure effective access to their constitutional right to select a nonpublic school education for their children.

The Court below distinguished the cases above cited and other similar ones on the basis that in those cases what was held invalid was a State exaction preventing the exercise of constitutional rights. At the same time, however, the Court disregarded the fact that the results of those cases may require a State expenditure of money for the benefit of the persons benefited by the constitutional right being exercised. As pointed out above, free legal counsel must be provided to indigents, requiring the outlay of funds to appointed attorneys; free transcripts must be provided as a part of access to the courts, requiring the outlay of State money to stenographers providing the transcripts; and one of the cases cited by the Court below, *Sherbert* v. *Verner* (374 U. S. 398 [1966]), prohibited the denial of unemployment insurance benefits to a person who refused to work on Saturday because of religious beliefs, thus requiring the payment of moneys to a person to further the practice of his religious beliefs.

New York's tuition reimbursement program also, we submit, meets the test of constitutionality set by this Court for statutes which may provide incidental aid to sectarian institutions. The Court below found that Article 12-A has a secular purpose, that is, the securing of the constitutional rights of low income citizens. Its primary effect is not to aid or inhibit religion, but rather to aid those same low income citizens in securing their choice of education for their children. The fact that there may also be some indirect benefit to the nonpublic schools does not by itself, as this Court held in *Board of Education* v. *Allen, supra*, "demonstrate an unconstitutional degree of support for a regligious institution". Finally, reimbursement to *parents* of a portion of the tuition which *they*

have paid does not result in an excessive entanglement between the State and the *schools*. There is, in fact, no contact whatsoever between the two which could result in any entanglement.

It is, therefore, submitted that this case presents substantial questions as to the extent of the State's power to provide benefits to low income persons and to protect them in the exercise of their constitutional rights.

CONCLUSION

The questions presented on this appeal are substantial and should be heard, considered and resolved by this Court.

Dated: November 13, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellants,
Nyquist, Levitt and Gallman
The Capitol
Albany, New York 12224
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

of Counsel

APPENDIX "A"

Majority Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, As Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

---

72 Civ. 2286.

Majority Opinion

GURFEIN, *D. J.*

We are again confronted with the question of the constitutionality of an Act of the New York Legislature relating to nonpublic schools, the children who attend them, and their parents. The plaintiffs are an unincorporated association and individuals who are residents of the State of New York and who pay income taxes and other taxes to that State. Some of the plaintiffs have children attending public schools. The defendants are the Commissioner of Education, the Comptroller and the Commissioner of Taxation and Finance of the State of New York.[1]

Jurisdiction is alleged under United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202. The amount in controversy, exclusive of interest and costs, is alleged to be in excess of $10,000.

By consent of all parties, a motion to convene a three-judge court pursuant to Title 28, Sections 2281 and 2283, was granted and this Court was convened.

The plaintiffs seek to enjoin the defendants from approving or paying any funds or according tax benefits as provided in the Act to be described. The State seeks a dismissal of the complaint on the merits but asserts no jurisdictional bar to maintenance of the action.

Since no trial has been had, the attack upon the several parts of the Act assumes that they are each facially unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The Act (N. Y. Laws of 1972, c.414) is divided into five parts, three of which are attacked by the plaintiffs as being in violation of the establishment clause which guarantees the sepa-

ration of Church and State, as applied to the states by the Fourteenth Amendment.[2] These three parts of the statute which are under attack may be summarized as follows:

A. Section 1 provides for grants of money directly from the State Treasury to nonpublic schools for "maintenance" of the buildings if the nonpublic school has been designated during a base year as "serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. A. § 425)."[3] If the school qualifies under the federal standards, it is to be given a direct grant of $30 per pupil in attendance, which is increased to $40 per pupil to those schools which are more than twenty-five years old.[4] The grants, which are given directly to the particular nonpublic schools eligible for such grants, are to be in reimbursement of "maintenance and repair" costs incurred in the preceding year. "Maintenance and repair" is defined as "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner [the State Commissioner of Education] may deem necessary to ensure the health, welfare and safety of enrolled pupils." Each qualifying school which seeks an apportionment is required to submit to the Commissioner an application which shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

This part of the Act is entitled "Health and Safety Grants for Nonpublic School Children" and is prefaced by

certain legislative findings. These recite that: (1) it is the primary responsibility of the state to ensure the health, welfare and safety of children attending both public and nonpublic schools; (2) "[f]inancial resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic school;" (3) teachers are given incentives by the Federal Government to teach in these poor areas; (4) healthy and safe nonpublic schools contribute to the stability of urban neighborhoods; and finally (5) "[t]o insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."[5]

B. Section 2 of the Act provides for flat tuition grants from the State Treasury to parents with family incomes of less than $5,000 per annum who have children attending elementary or secondary nonpublic schools. The grant is in the sum of $50 a year for children in grades 1 through 8, and $100 in grades 9 through 12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent. The Commissioner is given "responsibility for the administration of the program" and is given authority to "promulgate such regulations as are necessary to carry out the provisions of this article." This section is entitled "Elementary and Secondary Education Opportunity Program."

Section 2 is prefaced by legislative findings that (1) "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their chil-

dren"; (2) the Supreme Court of the United States has recognized this "right" of selection, but the "right" is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education; and (4) it is a legitimate purpose for the State to partially relieve the financial burdens of parents who provide a nonpublic education for their children.

C. Sections 3, 4 and 5 provide that an individual shall be entitled to subtract, for State income tax purposes, from his Federal adjusted gross income an amount shown in a table for his New York adjusted gross income, multiplied by the number of his dependents, not exceeding three, attending a nonprofit nonpublic school on a full time basis, provided that he has paid at least fifty dollars in tuition for each such dependent.[6] This exclusion may be taken only by parents with adjusted gross incomes of from $5,000 to $25,000 who do not receive a tuition assistance payment under Section 2. The exclusion would be as much as $1,000 for each child, up to three chi'dren, enrolled in grades 1 through 12 with the net benefit to taxpayers apparently as shown in note 6, *supra*. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. The exclusion is deducted from adjusted gross income and is available to taxpayers whether they itemize or take the standard deduction.

This part of the Act is prefaced by legislative findings (§ 3) that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) nonpublic educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the courts; (3) by their existence, such educational institutions relieve the taxpayers of the State of the burden of providing public school education for the children who attend nonpublic schools; (4) tax laws also authorize deductions for education related to employment; and (5) similar modifications of Federal adjusted gross income should also be provided to parents for tuition paid to nonpublic schools.

We have stated the legislative findings offered in support of each part of the statute in detail because we wish to make it clear that we accept these findings, except where they purport to state principles of applicable constitutional law. They sum up legislative purposes which are cast as secular in intent. Thus, we must start with the assumption that the Legislature intended to preserve the health and safety of children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas. Similarly, we must start with the assumption that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society by giving money from the State Treasury to poor parents for tuition in nonpublic schools. And lastly we must assume that taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools.

In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to support the legislation, the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support. If that is constitutionally permissible, it is a worthy objective and one that should not be lightly set aside in the alleged interest of public education. Both public and nonpublic education can exist side by side. Neutrality forbids discrimination in favor of one system over the other.

Whether the main reason for this *legislative* concern is the fear that an intolerable financial burden will be cast upon the public schools if the nonpublic schools do go under, or whether the main reason is the survival of religious education, is not the particular *judicial* concern. We must weigh not only the purpose of the legislation but its effect on the traditional separation of Church and State in this country. As to the former, we accept the legislative statements. As to the effect, we must exercise the judicial function of interpreting what effect the legislation will have upon areas protected from invasion by the consitutional guaranty.

This is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exer-

cise. Since the policy of separating Church from State is not merely one of policy but of constitutional provision, the ultimate determination of such conflicts must rest in the judicial branch. And the judges must be especially careful in this delicate area not to allow their personal predelictions on policy to circumscribe their judgment as to the constitutional effect of particular legislative proposals. We must make a constitutional decision between these two worthy objectives. Yet, as an inferior federal court, we are not permitted to view the religion clauses of the First Amendment in a literal or even in an historical fashion. We have only to determine their meaning as authoritatively expounded by the Supreme Court. We shall, therefore, discuss the constitutionality of each of the three parts of the statute under the guidelines laid down by the Supreme Court, as we understand them.

I

The findings of the Legislature in respect of the needs of parochial schools in low income areas must, as we have said, be accepted as fact. For us to delve into the reasons why parochial education is stratified by the boundaries of richer or poorer districts would be improper, for that would be trenching on the prerogatives of religious denominations which must determine their own priorities and administration without State interference under the Free Exercise Clause of the First Amendment, as well as under the negative implications of the Establishment Clause. It is not to be gainsaid that slum-area parochial schools do have financial troubles. The issue is whether it is constitutional for the State to maintain them. Of the estimated 280 schools in the low income areas, which the Legislature

seeks to help, all or practically all, it was conceded upon the argument, are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree. It is at this point that we must pause to review the history of the Establishment Clause in the courts in the light of the respective contentions of the parties.

The First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Cantwell* v. *Connecticut,* 310 U. S. 296 [1940]; *Murdock* v. *Pennsylvania,* 319 U. S. 105 [1943]), provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

In *Everson* v. *Board of Education,* 330 U. S. 1, the Supreme Court was for the first time required to determine what was "an establishment of religion" in the First Amendment's conception (see *id.* at 29). It was there recognized by all the Justices that not simply an established church, but any law respecting an establishment of religion is forbidden and that schools teaching religion come within the scope of the clause prohibiting the "establishment of religion."[7] The precise issue in that case, upon which the Court divided five to four, was the constitutionality of a New Jersey statute which allowed reimbursement of parents for the bus fares of children attending parochial schools as well as public schools; the particular provision was held constitutional. In view of the broad meaning attributed to the Establishment Clause by all the Justices, it is instructive to consider the limitations set upon their own decision by a majority of the Court. In the words of Mr. Justice Black for the majority, the "establishment of religion" clause "means at least this: . . . No tax in any

amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 15-16. Nor is the prohibition only against a tax *levy* to support religious teaching. It is also against *using* tax-raised funds for that purpose. Mr. Justice BLACK wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute* tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (emphasis added).

The majority of the Supreme Court did conclude, nevertheless, that the reimbursement of bus fares to parents was public welfare legislation, and that New Jersey could not be prohibited from extending its general state law benefits to all its citizens without regard to their religious beliefs. But the Court was careful to note in support of its decision that "[t]he State contributes no money to the schools. It does not support them." 330 U. S. at 18.

The general language, however, did not remove the delicacy or the difficulty of the issues raised in succeeding cases. For we are a nation which recognizes value in religion but seeks to maintain neutrality in that sphere. Neutrality is not merely a state of mind, however. Neutrality inevitably means a relationship to religion, one way or another. And thus the Court formulated a two-fold test for sustaining legislation alleged to violate the Establishment Clause: There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *School District* v. *Schempp*, 374 U. S. 203, 222 (1963). The Court recognized that this test "is not easy

to apply," but that a law which "merely makes available to all children the benefits of a general [New York State] program to lend school books free of charge" is not in violation of the Establishment Clause. *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). This decision brought forth three dissents, as well as a concurrence by Mr. Justice HARLAN on the limited ground that the statute there involved "does not employ religion as its standard for action or inaction." *Id.* at 250.

The bifurcated test of intent and effect was again accepted in *Walz* v. *Tax Commission*, 397 U. S. 664, 669 (1970), a case to which we shall advert later. Furthermore, to the two tests was added a third, that the statute must not involve an "excessive entanglement" with religion. *Id.*

Yet, the issue of direct financial grant to parochial schools had not yet confronted the Court. Last year, such an issue was finally presented in the case of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). This case is not only the most recent, but the most closely in point to the question of direct grants to primary and secondary parochial schools under Section 1 of the statute before us, as is *Tilton* v. *Richardson*, 403 U. S. 672, decided the same day.

The *Lemon* case involved legislative grants as supplements to teachers' salaries in parochial schools in Pennsylvania and Rhode Island. The Rhode Island statute contained a legislative finding that the quality of education available in nonpublic elementary schools was jeopardized by the rising salaries needed to attract teachers, and authorized state officials to supplement the salaries of teachers of secular subjects in those schools by direct limited pay-

ment to the teacher, who was to teach only subjects taught in the public schools and no courses in religion. The Pennsylvania statute contained a legislative finding of rapidly rising costs in the State's nonpublic schools, and authorized reimbursement by the State to nonpublic schools of actual expenses for teachers' salaries, text books and instructional materials only in teaching secular subjects, and expressly excluded religious teaching.

Each statute, it will be seen, makes a distinction between that function of the parochial school which teaches secular subjects and that function which teaches religion, and stresses that state aid is not to be given for religious teaching. However, both the Pennsylvania and the Rhode Island statutes were struck down by the Supreme Court as violative of the Establishment Clause.

The opinion by the Chief Justice chose to hold the state legislation in violation of the Establishment Clause on the third of the three tests—excessive entanglement. This excessive entanglement was found to be of two kinds—administrative and political. The latter was based upon the prediction that continuing financial pressures on the nonpublic schools would, because of the annual nature of appropriations, generate considerable and recurring political activity to increase state aid, and that such activity would be along religious lines.

This choice of tests avoided the necessity to decide whether in *all* cases direct aid would be unconstitutional. But there is no indication, in our view, that the primary effect test, as a separate test, has been abandoned. And so far as precedent is concerned, the only direct aid to church-related institutions thus far sustained by the

Supreme Court has been aid to hospitals, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899) and the colleges in *Tilton*, where religious indoctrination was not a substantial purpose or activity of the church-related institutions. Nor was there any overruling in *Lemon* of various statements of the justices that direct subsidy which aids schools with a religious mission would be unconstitutional. The striking down in *Tilton* of the provision inferentially permitting use of the buildings after twenty years for religious purposes, on the contrary, appears to bring such a subsidy within the primary effect test, without regard to the excessive entanglement test. *Tilton* is discussed more fully below.

While the opinions of the Justices who wrote separately supporting the result in *Lemon* differ in reasoning, the quintessence of what was held may, perhaps, be gleaned from the sole dissenting opinion, that of Mr. Justice WHITE. 403 U. S. at 662. He stated the issue in the following terms: "Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school. The issue is fairly joined." Mr. Justice WHITE relied strongly on the Free Exercise Clause to support his dissent, a view also urged upon us. But the rest of the Court refused to

consider the conceded constitutional right of a parent to send his child to a parochial school as sufficient to sustain the public subsidy by the States in the face of the Establishment Clause. And Mr. Justice WHITE himself made it clear that his dissent in the Rhode Island case was based upon findings of the District Court, which he maintained were ignored by the majority; and in the Pennsylvania case, he dissented only from the holding that the statute was *facially* unconstitutional.

It is important, because of the varied reasoning of the majority, to note what Mr. Justice WHITE, as well, considered to be unconstitutional, and then to compare that formulation with the issue before us. Mr. Justice WHITE explained:

> "As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional." 403 U. S. 671 n. 2.

In the case at bar, we are dealing largely with the same parochial school system that was before this Court in *Committee for Public Education and Religious Liberty* v. *Levitt and Nyquist*, 342 F. Supp. 439 (S. D. N. Y. April 27, 1972). The answers to interrogatories made there established that New York State construed as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious

activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7) There seems to be no dispute that the statute here is also intended to apply to such schools.[8]

In *Tilton* v. *Richardson*, 403 U. S. 672 (1971), the Court held, five to four, that payments could be made under the Higher Education Facilities Act of 1963 to certain church-related *colleges* under one-time Federal construction grants for college facilities excluding "any *facility* used or to be used for sectarian instruction or as a place for religious worship or . . . primarily in connection with any part of the program of a school or department of divinity" (emphasis added). The Act permitted the Government to recover the funds granted within twenty years, if the restrictions on use of the building for religious teaching were not met. While sustaining the payments, the Court held unanimously that limiting the right of the Government to recapture the payment if the building should be used for religious purposes *after* twenty years was unconstitutional. It was accepted that the use of public funds for the construction of a building to be used for the teaching of religion was facially unconstitutional. Again, Mr. Justice WHITE, while suggesting that the Court in *Tilton* was rul-

ing that payments made directly to a religious institution are, without more, not forbidden by the First Amendment, 403 U. S. at 664, nevertheless concurred in the Court's invalidation of the provision whereby the restriction on the use for religious purposes of buildings constructed with Federal funds terminates after twenty years, 403 U. S. 665 n.1. The line drawn, it seems to us, is that while an entirely separate building of a church-related college, in no way related to the teaching of religion or the housing of worship, may receive public funds, it may not receive such funds from the moment when secular and religious teaching or prayer are mixed in the same building.

Moreover, a direct grant to the parochial school is not the same as an across-the-board payment to parents of parochial school children which advances the common good as distinguished from religious good, and which equalizes the burden of the nonpublic school parent. The majority by Mr. Justice WHITE in *Allen, supra*, pointed out the distinction: "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U. S. at 243-44. Mr. Chief Justice BURGER, in *Lemon*, noted that "the Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools." 403 U. S. at 621. He distinguished *Everson* and *Allen* on the very ground that there state aid was provided to the student and his parents—not to the church related school. And he noted that in *Walz* the Court had warned of the dangers of direct payments to religious organizations. *Id.*[9]

In Mr. Justice BRENNAN's view, "[g]eneral subsidies of religious activities would, of course, constitute impermis-

sible state involvement with religion." *Walz* v. *Tax Commission, supra,* 397 U. S. at 690.

This view is supported by history. The New York State Constitution provides in Article XI, § 3:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

Fewer than a half-dozen states omit such a provision. See 403 U. S. 647 & n. 6. While the ultimate decision in the *Tilton* case prohibited a grant for construction of a building used for religious teaching (even after twenty years), the Constitution of New York itself prohibits the granting of such funds for "maintenance," the very objective of Section 1 of the statute we are considering. While it is not our purpose to determine constitutionality under the New York Constitution—a matter reserved for the State courts—we cannot avoid being impressed, in our consideration of the guidelines of the Supreme Court, by the almost unanimous views of the states as expressed in their respective constitutions adopted by the people.

The argument is made, however, that since janitorial functions and snow removal obviously are not the teaching of religion, their neutral character permits a benevolent grant for these purposes from the tax raised funds in the State Treasury. The argument is bottomed on the assump-

tion that a parochial school budget is divisible. It rejects the argument that once a public subsidy is given it lightens the burden on the rest of the budget and even permits more of the other private money to be used for religious instruction. Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion. If it be argued that the subsidy would go only to the needy parochial school which has no surplus to apportion, the short answer is, of course, that such a parochial school would have more than it has now, for it does now pay from its present budget for janitor services and heat.[10]

The vice, moreover, is not only that the school budget as such as indivisible, but that no effort is made in this part of the statute to distinguish between secular and religious education. The janitorial service embraces cleaning the chapel, where there is one, and heat is provided to the classrooms where religion is taught. There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom. *Cf. Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 211 (1948).[11]

Nor is the aid provided, though neutral in the sense of direct religious activity, given to any but a small class of institutions, almost all Roman Catholic, in deprived areas. It provides direct support for the maintenance of schools which teach religion.

Moreover, as Chief Justice BURGER said in *Walz*, *supra*, "Obviously a direct money subsidy would be a relation-

ship pregnant with involvement," 397 U. S. at 675. The "involvement" includes the inevitable auditing of reports of expenditures for maintenance and repair which surely must include the right of the State to determine the fairness of the charges made. The determination must be made whether the expenditures were, in fact, commensurate with the amount of the grant under the formula.

And the very percentage formula ($30 or $40 per pupil out of the entire tuition), honestly intended to avoid use of the subsidy for religious purposes, inevitably requires an assessment of how much of the education supplied is secular and how much religious. It is argued that the Legislature was careful to allow only fifty per cent of the actual costs of "maintenance and repair," as a maximum, and that this is assurance that the maintenance grant is not for religious teaching. But the very argument invites considerations of the percentage relationship of secular to religious teaching and the relative impact of religious indoctrination. The *Tilton* approach is not possible where the school to be benefited is not merely church-related but is itself part of the religious mission. If the Legislature is to be asked to determine formulas based on religious teaching *vel non*, it invites the very excessive entanglement we were instructed to avoid in the *Lemon* case.

If public subsidy for janitorial service and heat to needy nonpublic schools is allowed, we may ask whether the next step will not be to supply desks and blackboards and ultimately part of a building on a percentage basis, on the ground that these are not religious in character. Would it not then be argued that where a building is in serious disrepair it is better not to patch it up but to build a new

building with public funds on the ground that such would be a health and welfare grant?

Nor is the argument based on the police power of the State convincing. Education is as much an important function within the police power of a State as are health and safety. See *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954). The conflict of the First Amendment with the police power has been made apparent in the constitutional decisions affecting educational activity by the states. Almost any legitimate activity, except the teaching or preaching of religion itself, can be said to be within some element of police power of the State. Yet, a State law enacted in the exercise of otherwise undoubted State power may not prevail against Federal law. See *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U. S. 225, 229 (1964). State power, as we have been instructed, cannot, in this area, leap the constitutional barrier when it uses direct, special subsidy as the means to implement such power.

The political pressures on the Legislature are bound to be strong along religious lines. As the Chief Justice said in *Lemon:* "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U. S. at 623.[12]

To summarize our reluctant conclusion that we cannot sustain a direct public subsidy for the "maintenance and repair" of religious schools under the guidelines of the Supreme Court, our points of departure with the argument of the State of New York are that: (1) "No tax in any

amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to *teach* or practice religion." *Everson, supra,* 330 U. S. at 16 (emphasis added). We think *Tilton* does not overrule the application of the dictum to the case at bar. (2) The statute involved though concentrating on schools in deprived areas, makes no distinction between secular and religious teaching, and tax-raised funds are directly used for the maintenance of buildings which teach religion. (3) We cannot accept the view that, under present doctrine, budgets for churches, synagogues or parochial schools can be made divisible by ascribing a percentage of cost to neutral functions. (4) On the contrary, we interpret the dictum of the Supreme Court that neutral services may be afforded to parochial schools to mean simply that general services, such as transportation, secular books, free lunches and, perhaps, athletic training, visiting nurses and the like, afforded to students in *all* schools may also be made available to students in parochial schools. (5) We think that, unlike the one-time construction of new buildings as in *Tilton,* the "maintenance and repair" provisions of the New York statute involve "continuing financial" and political "relationships [and] dependencies" *Tilton, supra,* 403 U. S. at 688.[18]

In sum, we hold that, although we accept the intention of the legislation as being essentially secular and within the police power of the State, the effect of Section 1 of the statute in its present form is inevitably to advance religion. We hold, alternatively, that that Section creates a potentially excessive entanglement of the State with religion with potentially undesirable consequence to both.

II

Section 2 of the statute provides for partial reimbursement to needy parents for the tuition they pay to send their children to parochial schools. Although the payment is to the parent, by hypothesis he is within a low annual income bracket (below $5,000) which would make it possible that he could not afford to send his children to parochial school in the absence of a direct subsidy from the State Treasury. Indeed, it is the very assumption of the Legislature in its findings that he will use the money grant for tuition. Whether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance. The recipient is the parochial school. The source is the State tax-derived money. The parent is simply a conduit. See *Griffin* v. *County School Board,* 377 U. S. 218 (1964); *Griffin* v. *State Board of Education,* 239 F. Supp. 560, 563 (E. D. Va. 1965), *overruled on other grounds,* 296 F. Supp. 1178 (E. D. Va. 1969); *Wolman* v. *Essex,* 342 F. Supp. 399 (E. D. Ohio 1972).

While in the general distribution of a State aid program, as in the case of reimbursement of bus transportation to parents *(Everson, supra),* the loan of text books to students *(Allen, supra),* free lunches to children and the like, there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive.[14]

The essential reliance of the State in support of this part of the statute is twofold: (1) that the free exercise of religion is inhibited if the needy may not be subsidized with State funds to aid their "right" to a parochial school education for their children; and (2) that the State will gain economic benefit from supporting parochial schools, because otherwise the fiscal burden cast upon the State in the event of their unfortunate demise will be almost intolerable.

These are serious arguments that cannot be disregarded, particularly when made by a State Legislature, and we have given considerable thought to their meaning and implications, particularly in the light of our sympathy for the argument that in a pluralistic society it is a positive good to have a variety of educational institutions, not all public. As we have delved into the implications of these arguments we have become convinced, however, that, under our oath to defend the Constitution, we must hold that they fail.

The argument based on the Free Exercise Clause has a superficial appeal. Why should a richer man have the right to practice his religion as he sees fit while a poor man cannot do so only because of his poor financial condition? Are we not a nation that abhors distinctions based on wealth, and have we not strained the fisc to equalize the condition of rich and poor before the law? Indeed, we have left partisanship behind in our common belief that equality, so far as it is possible to achieve, is a desirable goal for our society.

The propagation of religious doctrine was early made the responsibility of the particular denomination in hard

times as well as good times. We know, however, that inflation was no concern of the framers of the First Amendment, and, as individuals, we sympathize with its victims. But a State-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a State-supported school.[15]

While there can be no proof either way, it is possible that among persons eligible for the tuition grant there will be not only those who now have their children in a parochial school but also some whose children now attend the public schools and whom they would transfer to a parochial school.

The implications of recognizing a "right" to the support of public funds for the expression of the free exercise of religion are, moreover, staggering. Religious belief and the right to practice religion, including the teaching of the young, are precious rights to be preserved unto death itself. But a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. These are all "rights" to the free exercise of religion that cannot be denied, and from the exercise of which the poor may be excluded by circumstance.

If the Founding Fathers had any intentions about religion it was surely to separate the concern of the Government from the concern of the individual religious community. That is why we have the double-edged religion clauses of the First Amendment—no law respecting the establishment of religion *or* the free exericse thereof. Each sector must not only respect its own proper functions. Each must also support them. This appears to be the essence of the voluntarism requirement of the First Amendment; see HARLAN, J., concurring in *Walz, supra*, 397 U. S. at 696.

The examples cited by the State to support its argument for tuition reimbursement to poor parents deal with the striking down of exactions by the State of money from the poor as a condition to their exercise of particular constitutional rights, like the right to sue in the courts for divorce without paying court costs, *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), and the right to vote without paying a poll tax, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). So, too, *Sherbert* v. *Verner*, 374 U. S. 398 (1963) held invalid the denial of unemployment benefits where the free exercise of religion was inhibited. The statute here, on the contrary, affirmatively establishes benefits for the free exercise of religion. No case has been cited where an affirmative cash subsidy to advance the constitutional right to the free exercise of religion was allowed.

Nor do we ignore the argument forcefully put by the State and by representatives of the able majority leader of the State Senate. The possible closing of Catholic parochial schools on a large scale would cast a heavy burden on an already overburdened State. But we must

recognize, within the guidelines set by the Supreme Court, that economic hardship alone is not enough to overcome the strictures of the First Amendment. The Court in *Lemon, supra,* accepted the legislative findings of economic stringency in the parochial schools, with the obvious, if not fully articulated, potential effect on the State finances of Rhodes Island and Pennsylvania. It, nevertheless, struck down what were clearly economic measures to help the fiscal condition of the nonpublic schools with the possible consequence of forced absorption of their burdens by the States.

The argument, like many good arguments, stretches the band to the breaking point. For it must be tested for validity against contingencies which could occur and which would have a strong effect on legislative action, not only because of religious pressures on the legislators, but because of the conviction that the public treasury has more to gain by supporting church schools directly than by not supporting them.

If conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers. But that is what has just been invalidated by the Supreme Court. The argument would logically admit of circumcumstances, honestly based upon economic need, which would support the grant of public funds, at least for secular education, in geographic areas where there were not enough parochial schools, and where the pressure of population would otherwise cause great hardship to the neighborhood public schools. Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial schools with the inevitable control by the State

built into an anomalous situation. That is a condition devoutly not to be wished. The proponents of this legislation will probably affirm that they are willing to take their chances on such an eventuality and that they would rather have the funds in hand. But it is the peculiar function of the judicial branch to remain unmoved by current desires, not in the sense of usurping the province of legislatures, but in viewing basic constitutional provisions as outliving the generation of men which has to interpret them.[16]

III

The third part of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the ongoing political activity as likely, in our opinion, to cause division on strictly religious lines.

We shall explain our reasons briefly.

There has always been a sharp distinction in the history of the United States between direct grants of public funds to religious institutions, generally prohibited, and tax exemption for religious institutions, generally permitted. This indirect aid to religious institutions has largely taken two forms, exemption from local property taxes and the like, and income tax exemptions for contributions to religious institutions. The former method was lately before the Supreme Court in *Walz, supra.* The latter method has never been challenged in the Supreme Court. As the Court noted in *Walz,* the real property tax exemption provision for churches is two hundred years old. The acquiescence in the practice by the people, the historical absence of religious divisiveness, and the exemption's ancient origin were considered to lend support to its exclusion from the restraints of the religion clauses of the First Amendment.

In *Walz,* the Court recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . ." 397 U. S. at 674; yet the New York statute granting to churches as well as other educational and civic institutions exemption from real property taxes was sustained. The Court also noted in *Walz* that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

It certainly can be argued that if the power to tax is the power to destroy, the power not to tax is the power to support. The Supreme Court has not accepted that view, and has rejected the argument that exemptions do not differ from subsidies as a matter of economics.

Our distinguished colleague, Judge HAYS, in his dissenting opinion assumes constitutional invalidity because the "purpose and effect of the statute [Part III] are . . . to subsidize religious training for children." Why, then, it may be asked, does not an income tax deduction for a contribution to a church "subsidize" religious worship for parents? If, indeed, "there is no essential difference between a parent's receiving a $50 reimbursement for tuition paid to a parochial school and his receiving a $50 benefit because he sends his child to a parochial school," then there should be no essential difference between a parent's receiving a $50 "reimbursement" for a payment to his parish church and his receiving a $50 "benefit" for the same payment. As Judge HAYS states it, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." With great respect, we paraphrase this to say that, in our illustration as well, it could be said that the money involved represents a charge made upon the State for the purpose of denominational worship. Yet we have abided this very condition in our taxing system for many years, although we know that some denominations conduct church-related Sunday Schools or even weekday afternoon classes in religion.

Whether the distinction is based on logic, history or simply on an authoritative guideline set by the Supreme Court, we may approach our difficult task with the distinction between subsidy and tax exemption in mind. It cannot be a perfect guide, for the statute involved in *Walz* gave real property tax exemption to a great many institutions, not only churches, there was no question of arbitrary classification, and alleged State involvement with religion was at least equivocal. On the other hand, in favor of its validity

is the circumstance that under Section 3 of our statute, the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed. This kind of income tax relief, while not as old as property tax exemption because the constitutional income tax law itself is relatively modern, has been on the Federal statute books for more than half a century. It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income.[17] This has always included direct gifts to churches. The purpose is no doubt to encourage such contributions. 5 J. Mertens, Law of Federal Income Taxation § 31.01 (1969); *Bliss* v. *Commissioner*, 68 F. 2d 890 (2 Cir. 1934), *aff'd* 293 U. S. 144 (1934).

We think that, aside from the "equal protection" problem which we do not pass upon, the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit, nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost $25,000 to a forgiveness roughly approximating the tuition cost of $50 per child for a family in the lowest bracket. A memorandum prepared by Senator Brydges indicates that a family with three children in a nonpublic school would get a net benefit annually ranging from $150

if the family has an adjusted gross income of less than $9,000, to $36 if the family has an adjusted gross income of $24,999. The benefit is inverse to income. And we believe the Legislature has power to decide between allowing deductions and allowing credits.[18]

It seems to us unlikely, at least in the absence of strong proof, that a person having $6,000 to $9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the parochial school as additional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State loses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher bracket should forgo the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source.

Once we have hurdled the constitutional barrier to income tax benefit for contributions directly made to churchs, as we believe we must, there is not much further to travel. It is true that the argument may be advanced as the dissenting opinion does that the parent receives a consideration in the education of his child, while there is no *quid pro quo* in a contribution to a church. And we understand that the Federal tax authorities do scrutinize contributions of parochial school parents with that yardstick. See *Fausner* v. *Commissioner*, 55 T. C. 620 (1971).

We are not dealing, however, with the interpretation of a revenue act but with an inquiry upon the limitations of the power of a State Legislature under the Federal Constitution. As a Court, we may not pass on questions of religious values or even adumbrate the moral or religious "consideration" that may accrue to the donor of a gift to the church of his choice.

We put it more simply in practical terms. If a parishioner made a contribution to his parish, and the parish school were entirely free of tuition, would he be denied his income tax deduction because his child attended that school? Opinions may differ on the interpretation of present statutes, but it seems to us likely that an affirmative formulation by the Legislature would be constitutional.

We have not been asked to pass upon the constitutionality of part three on "equal protection" grounds, and we do not do so, *cf. Everson, supra,* 330 U. S. at 4-5.[19] Putting such argument to one side, we think that the pressure on legislators to amend the income tax law is likely to be more from nonpublic school parents as a group rather than from parents of a single religious denomination. The principles of equity rather than of religious aid will probably be put to the fore if further liberalization by the Legislature is sought. And that we believe would not make for an inevitable excessive entanglement with religion in the legislative halls. As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid.

We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those

who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute. 1 J. Mertens, *supra*, § 4.09. As we have said, however, we do not now deal with the "equal protection" argument, the reasonableness of the classification by those standards, or whether there is an appropriate governmental interest suitably furthered by the different treatment. See *Police Department* v. *Mosley*, ____ U. S. ____, 92 S. Ct. 2286 (1972).

We hold only that Section 3 of the statute is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment.

We also find Section 3 of the statute separable from the parts found to be unconstitutional. The statute itself contains a separability clause (§ 11). And we are not required to invalidate the entire Act. See *Tilton, supra*, 403 U. S. at 683-84; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 234 (1932).

A permanent injunction will be issued against the enforcement of Sections 1 and 2 of the statute. Judgment will be entered accordingly, pursuant to Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay. A permanent injunction against enforcement of Section 3 of the statute will be denied. The complaint so far as it relates to Section 3 of the statute, will not be dismissed, however. The parties may move for summary judgment or for an expedited trial.

An order will be settled on notice.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Dated: October 2, 1972.

PAUL R. HAYS, *U. S. C. J.*

JOHN M. CANNELLA, *U. S. D. J.*

MURRAY I. GURFEIN, *U. S. D. J.*

FOOTNOTES

[1] Parents of children enrolled in nonpublic schools have been permitted to intervene as parties defendant. Similar permission was granted to Hon. Earl W. Bridges, Majority Leader and President *pro tempore* of the New York State Senate.

[2] The sections of the Act not under attack provide for impacted aid to public schools which have increased enrollment due to the closing of nonpublic schools, and provide for the purchase of nonpublic school buildings by public school districts where the nonpublic school has been closed (Sections 6-10).

[3] 20 U. S. C. § 425 deals with the partial forgiveness by the Federal Government of certain educational loans to students who become teachers in "a school in which there is a high concentration of students from low-income families," and provides a method for determining that criterion.

[4] The amount of the grants is limited to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner."

[5] Because of the suggestion that it was essential for the State to know promptly whether it could disburse the funds as provided in Section 1, we announced in a *per curiam* opinion our holding that this Section was in violation of the First Amendment as applied to the states by the Fourteenth Amendment. This opinion elaborates that decision.

[6] The table is as follows:

If New York adjusted gross income is:	*The amount allowable for each dependent is:*
Less than $9,000	$1,000
9,000—10,999	850
11,000—12,999	700
13,000—14,999	550
15,000—16,999	400
17,000—18,999	250
19,000—20,999	150
21,000—22,999	125
23,000—24,999	100
25,000 and over	-0-

Estimated Net Benefit to Family		
One Child	*Two Children*	*Three or more*
$50.00	$100.00	$150.00
42.50	85.00	127.50
42.00	84.00	126.00
38.50	77.00	115.50
32.00	64.00	96.00
22.50	45.00	67.50
15.00	30.00	45.00
13.75	27.50	41.25
12.00	24.00	36.00
-0-	-0-	-0-

[7] *Id.* at 15 (BLACK, J.), see *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948).

[8] The plurality opinion in *Tilton, infra,* by the Chief Justice makes it clear that the plurality were convinced that, with respect to the four colleges there involved, "religious indoctrination is not a substantial purpose or actvity of these church-related colleges and universities." 403 U.S. at 687. On the other hand, aid to primary and secondary parochial schools is supported in New York on the very ground that parents have the right to choose parochial school education for their children as an important incident to their free exercise of religon, which includes the right to provide for religious indoctrination of the children through the parochial school.

[9] The impact of *Lemon* and *Tilton* on direct cash payments is suggested by two memorandum decisions filed on the same day. The Court vacated and remanded, for consideration in the light of *Lemon* and *Tilton, Kervick* v. *Clayton* and *Hunt* v. *McNair,* 403 U.S. 945 (1971). *Kervick* had upheld construction loans under the *New Jersey Educational Facilities Authority Law,* 56 N. J. 523, 267 A. 2d

503 (1970). *Hunt* had upheld the issuance of bonds to pay off the indebtedness of a Baptist College under the Educational Facilities Authority Act, 255 S.C. 71, 177 S.E. 2d 362 (1970).

The Supreme Court of New Jersey, after the remand, held valid the statute which creates an Educational Facilities Authority to sell bonds and lend the proceeds to educational institutions, without pledging the credit of the State. *Clayton* v. *Kervick*, 59 N.J. 583, 285 A. 2d 11 (1971). But it concluded that even with respect to loans, as distinguished from grants, a facility may not be used for sectarian instruction or as a place of religious worship even after repayment of the loans; and no college may participate if it restricts entry on racial or religious grounds or requires all students gaining admission to receive instruction in the tenents of a particular faith. *Id.* at 20-21.

The Supreme Court of South Carolina also upheld its loan statute which provided that the facilities involved shall not be used for sectarian instruction. *Hunt* v. *McNair*, 187 S.E. 2d 645, 652 (1972).

[10] The State urges upon us for consideration some language of Chief Justice BURGER in *Tilton, supra,* to the effect that "[c]onstruction grants surely aid these institutions [the church-related colleges] in the sense that the construction of buildings will assist them to perform their various functions." 403 U.S. at 679. The State notes that this form of governmental assistance was upheld.

Taking it in its literal sense the argument from the language is a fair one. But the quoted language must be read in the light of the Chief Justice's actual holding that use of the buildings for religious purposes, even after twenty years, was unconstitutional.

[11] The Supreme Court of Wisconsin recently held to be in violation of the Establishment Clause of the First Amendment a statute which authorized the contracting for purchase of dental education by the University [Marquette] dental school because it permitted the use of funds paid under the contract "in support of the operating costs" of the university without limiting the use of such funds exclusively to the providing of dental education in the dental school of the university. *State ex rel. Warren* v. *Nusbaum* (State No. 266, July 7, 1972). This result was reached even though the Court recognized that the very nature of dental education assures the completely secular nature of the teaching of dentistry.

[12] The brief of Senator Brydges argues that "[i]t is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its [*sic*] debates" (p. 37). We think that the Supreme Court, in its emphasis on "excessive entanglement" did not intend to limit legislative debate, but

rather to strike down legislation which would encourage future divisive debate on religious lines. Whether this constitutional test should be modified is not within the province of this District Court. The argument can be made only to the Supreme Court.

[13] It must be noted that the colleges involved in *Tilton* were not directly controlled by the church; the elementary and secondary schools covered by the New York statute are controlled by a religious hierarchy.

[14] Senator Brydges' brief argues as "history" (p. 16) that with respect to Section 3209 of the N.Y. Education Law, the New York Attorney General in 1935 ruled that it applied to children attending parochial schools as well as public schools. We agree that the affirmative duty of "public welfare officials" to furnish "indigent children with suitable clothing, shoes, books, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law" does not require the denial of these benefits to needy children who attend parochial schools. But there is nothing in that statute concerning the payment by the state of tuition for needy children. The Education Law involved a general grant to all which did not include tuition.

As to tuition, there may be situations where special circumstances make attendance at public schools impractical as in the case or orphan schools, see *Sargent* v. *Board of Education*, 177 N.Y. 317 (1904); Indian schools, Education Law, art. 83; and schools for deaf and blind children, *id.* art. 85. But those sections are not relevant to normal children who can attend the public schools.

[15] In the language of Chief Judge LORD in *Lemon* v. *Sloan*, 340 F. Supp. 1356, 1364 (E.D. Pa. 1972): "The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid those schools."

[16] (a) A similar conclusion was recently reached by a three-judge court in the Eastern District of Ohio. *Wolman* v. *Essex*, 342 F.Supp. 399 (E.D. Ohio 1972). There moneys had been appropriated for "educational grants to parents" and for the provision of neutral, nonreligious "materials and services" for pupils attending nonpublic schools. The statute was held to be in violation of the Establishment Clause of the First Amendment.

(b) A Pennsylvania Act providing for reimbursement of tuition payments to parents whose children attend nonpublic schools was declared unconstitutional in spite of a legislative declaration that parents who send their children to nonpublic schools assist the State

in reducing the rising cost of public education, and that if children now attending nonpublic schools were forced to transfer to public schools "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state" *Lemon* v. *Sloan, supra* at 1366 (three-judge court). Chief Judge LORD wrote: "If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so." *Id.* at 1365.

[17] Revenue Act of 1917, c.63, § 1201(2), 40 Stat. 331. That statute allowed as a deducton, "[c]ontributions . . . made to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes."

[18] A deduction of $150 for a person in a 6% tax bracket ($7,000 to $9,000) would have given him only a nine dollar benefit.

[19] There the Court refused to consider whether the apparent exclusion of "private schools run for profit" violates the Equal Protection Clause of the Fourteenth Amendment, because the statute was not challenged on that ground.

APPENDIX "B"

Dissenting Opinion

HAYS, *Circuit Judge,* in part concurring in the result; dissenting in part:

I am in agreement with the view of my colleagues that the part of the state statute (N. Y. Laws of 1972, c. 414) providing for grants to private schools for the maintenance of buildings cannot survive a challenge based on the Establishment Clause and the cases decided under it. *Tilton* v. *Richardson,* 403 U. S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Bd. of Education* v. *Allen,* 392 U. S. 236 (1968); *Everson* v. *Bd. of Education,* 330 U. S. 1 (1947). I agree with Judge GURFEIN's view that the part of the statute providing for flat tuition grants to low-income parents is also unconstitutional. In addition to the cases previously cited see also *Wolman* v. *Essex,* 342 F. Supp. 399 (E. D. Ohio, 1972) (three judge court); *Lemon* v. *Sloan,* 340 F. Supp. 1356 (E. D. Pa., 1972) (three judge court). I therefore concur in the result reached by Judge GURFEIN as to these aspects of the statute.

I dissent from the court's judgment concerning section 3 of the state act. I believe that that section, which provides for tax benefits with respect to tuition paid by the taxpayer for children attending religious schools, is also unconstitutional.

The purpose and effect of this provision of the statute are the same as the second portion, *i.e.,* to subsidize religious training for children.[1] Both sections aim to reimburse parents who have chosen to send their children to religious schools. As Mr. Justice JACKSON said:

> "The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Everson* v. *Bd. of Education*, 330 U. S. at 24 (JACKSON, J. dissenting).

And "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (DOUGLAS, J. concurring).[2]

The benefits of the tax exemption allowed by section 3 are of the same nature as those accorded under the tuition reimbursement provisions of section 2. There is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education.

The exemption of church property from ordinary taxation provides no analogy for the tax benefits of the present statute. The schools in the nonprofit nonpublic category in New York State are tax-exempt, N. Y. Real Prop. Tax Law § 421(1) (a) (McKinney Supp. 1971), and that status is not in dispute in this case. In *Walz* v. *Tax Commission, supra*, the Court believed nearly two centuries of acquiescence in and approval of such exemptions lent support to the proposition that the exemptions did not violate the Establishment Clause. 397 U. S. at 680. Moreover, the Court noted in *Walz* that the State had not "singled out one particular church or religious group or even churches as such; rather it [had] granted exemption to all houses of worship within a broad class of property owned by non-profit, quasi-public corporations . . . ." *Id.* at 673. Here, as the three judge

panel pointed out in *Wolman* v. *Essex, supra,* "[t]he limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute." 342 F. Supp. at 412. Finally, the *Walz* court held (p. 674) that:

> "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church poperty, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."

The *Walz* decision, as the Court said in *Lemon* v. *Kurtzman, supra,* p. 614, "tended to confine rather than enlarge the area of permissible state involvement with religious institutions . . . ."

Nor does the present case concern the tax deductibility of religious contributions. Such contributions, even to church schools, are deductible under New York law, N. Y. Tax Law § 360 (10b) (McKinney 1966), and they would not be affected by the statute under scrutiny. Even assuming that tax deductions for contributions to religious schools are constitutional—a point not yet passed upon by the Supreme Court—we are not dealing with such deductions in the present case. A payment for services rendered is not a contribution, and such payments are not deductible. As the court said in *DeJong* v. *Commissioner,* 36 T. C. 896, 899-900 (1961), aff'd 309 F. 2d 373 (9th Cir. 1962):

> "We are satisfied on the record before us that at least a portion of the $1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable

contribution. Payments pledged and made by parents in the circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school."

See also *McLaughlin* v. *Commissioner*, 51 T. C. 233 (1968); *Fausner* v. *Commissioner*, 55 T. C. 620 (1971).

The tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools. It goes hand in hand with section 2. The benefits for section 3 parents begin at approximately the point where the grants to section 2 parents leave off.[3]

As a matter of fact section 3 is so closely bound up with section 2 that the invalidity of section 3 follows from its relationship to section 2. If it is evident that the legislature would not have enacted the part of the statute that is claimed to be within its power independently of that which is not, the statute is wholly invalid, regardless of the inclusion of a separability clause. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 234 (1932). It is obvious that the New York state legislature would not have enacted section 3 benefiting the wealthier parents had they not intended it to be a complement to section 2 benefiting low income parents. Section 3 must therefore fall if section 2 is unconstitutional, as we have held it is.

For the foregoing reasons I respectfully dissent from the determination of the court as to the constitutionality of section 3.

FOOTNOTES

[1] Although section 3 is made applicable to parents whose children attend *any* nonprofit nonpublic school, the overwhelming majority of these parents are sending their children to religious schools where sectarian indoctrination takes place. According to the Fleischman Commission report, religious schools make up 93.5% of New York State's *nonpublic* schools. The remaining 6.5% consist of both profit-making and non-profit-making private schools. Report on Nonpublic Education in the State of New York for the New York State Commission on the Quality and Financing of Elementary and Secondary education, "The Collapse of Nonpublic Education: Rumor or Reality?", Vol. 1, pp. 1-6. See Transcript in *Pearl* v. *Nyquist*, p. 64. The profit-making schools are not, of course, covered by section 3.

[2] In the context of racial discrimination, grants to schools, students or their parents to avoid the commands of the Fourteenth Amendment have been consistently struck down. See *Griffin* v. *School Bd. of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La., 1961), aff'd. 368 U.S. 515 (1962); *Lee* v. *Macon County Bd.*, 267 F. Supp. 458 (M.D. Ala., 1967) aff'd. *sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Brown* v. *South Carolina State Bd.*, 96 F. Supp. 199 (D.S.C., 1968) aff'd. 393 U.S. 222 (1968); *Coffey* v. *State Educ. Finance Comm'n*, 296 F. Supp. 1389 (S.D. Miss., 1969).

[3] The following table shows the estimated net benefits to taxpayers under section 3. The information is taken from the memorandum which accompanied the bill. It was submitted to each legislator by Senator Brydges and was cited by the majority *ante* p. ___.

If Adjusted Gross Income is	*Income Exclusion Per Pupil is*	*Estimated Net Benefit to Family*		
		One child	*Two children*	*Three or more*
Less than $9,000	$1,000	$50.00	$100.00	$150.00
$9,000 — 10,999	850	42.50	85.00	127.50
11,000 — 12,999	700	42.00	84.00	126.00
13,000 — 14,999	550	38.50	77.00	115.50
15,000 — 16,999	400	32.00	64.00	96.00
17,000 — 18,999	250	22.50	45.00	67.50
19,000 — 20,999	150	15.00	30.00	45.00
21,000 — 22,999	125	13.75	27.50	41.25
23,000 — 24,999	100	12.00	24.00	36.00
25,000 and over	0	0	0	0

APPENDIX "C"

Final Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President *Pro Tem* of the New York State Senate,

Intervenor-defendant.

---

72 Civ. 2286.

Final Judgment Appealed From

Plaintiffs' motion for the convening of a three-judge District Court pursuant to 28 U. S. C. §§ 2281, 2284 having come on to be heard on June 20, 1972 before the Hon. MURRAY I. GURFEIN, United States District Judge, and the parties having conceded at that time that this action required the convening of a three-judge District Court, and Judge GURFEIN having set the matter down for a hearing during the week of July 3, 1972 upon a representation that there were no factual issues involved; and the case having thereafter come on to be heard on the merits on July 6, 1972 before Judge GURFEIN, the Hon. PAUL R. HAYS, United States Circuit Judge, and the Hon. JOHN M. CANNELLA, United States District Judge, and all parties having submitted briefs and presented oral argument; and the Court, after due deliberation, having concluded on July 21, 1972 that Section 1 of Chapter 414 of the 1972 Laws of New York is in violation of the Establishment Clause of the First Amendment to the United States Constitution, and the Court having set forth the reasons for this decision in an opinion dated October 2, 1972; and the Court having further concluded in its opinion of October 2, 1972 that Section 2 of Chapter 414 is unconstitutional and that Sections 3, 4 and 5 of Chapter 414 are not in violation of the Establishment Clause of the First Amendment, Judge HAYS dissenting with respect to Sections 3, 4 and 5 of Chapter 414; and the Court having directed that judgment be entered, permanently enjoining enforcement of Sections 1 and 2 of Chapter 414; and the Court having further stated that the parties may move for summary judgment or for an expedited trial with respect to Section[s] 3 [and 4 and 5] of Chapter 414; and defendants and intervenor-defendants having duly moved for summary judgment dismissing the complaint with respect to Sections 3, 4 and 5 of Chapter 414;

Final Judgment Appealed From

Now, upon all of the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 1 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair; and it is further

ORDERED, ADJUDGED AND DECREED that Section 2 of Chapter 414 of the 1972 Laws of New York is unconstitutional in that it violates the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that the defendants and their agents and all persons acting for or on behalf of the State of New York be, and they hereby are, permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools; and it is further

Final Judgment Appealed From

ORDERED, ADJUDGED AND DECREED that Sections 3, 4 and 5 of the 1972 Laws of New York do not violate the Establishment Clause of the First Amendment to the United States Constitution; and it is further

ORDERED that defendants' and intervenor-defendants' motion for summary judgment with respect to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York be, and it hereby is, granted; and it is further

ORDERED that the complaint, insofar as it seeks a permanent injunction against enforcement of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York, be, and it hereby is, dismissed.

Dated: New York, New York, October 20, 1972.

.....
PAUL R. HAYS,
U. S. C. J.

.....
JOHN M. CANNELLA,
U. S. D. J.

.....
MURRAY I. GURFEIN,
U. S. D. J.

Entered:

.....

Final Judgment Appealed From

STIPULATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY *et al.*,

Plaintiffs,

against

EWALD B. NYQUIST etc. *et al.*,

Defendants,

and

GERALDINE M. BOYLAN *et al.*,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES etc.,

Intervenor-Defendant.

---

72 Civ. 2286.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that they represent all parties to this action, that they have read the above Order and Judgment

and that it is approved as to form and may be entered without further proceedings.

Dated: New York, New York, October 19, 1972.

.....
Attorney for Plaintiffs

LOUIS J. LEFKOWITZ

By .....
Attorney for Defendants

DAVIS POLK & WARDWELL

By .....
Attorneys for Intervenor-Defendants Boylan, Cherry, Ducey, Ferguson, Ferrarella, Roos and Ruiz

JOHN F. HAGGERTY and
LOUIS P. CONTIGUGLIA

By .....
Attorneys for Intervenor-Defendant Senator Earl W. Brydges

APPENDIX "D"

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Plaintiffs,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Defendants,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Intervenor-Defendants,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-Defendant.

Notice of Appeal to the Supreme Court of the United States

Sirs:

Notice is hereby given that defendants Ewald B. Nyquist, Arthur Levitt, and Norman Gallman hereby appeal to the Supreme Court of the United States from so much of the Order and Judgment entered in this action on October 20, 1972 as declares that sections 1 and 2 of chapter 414 of the New York Laws of 1972 violates the Establishment Clause of the First Amendment to the Constitution of the United States and permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * *from making any payments or disbursements out of State funds pursuant to the provisions of Section 1 of Chapter 414 of the 1972 Laws of New York in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools for maintenance and repair" and also permanently enjoins "the defendants and their agents and all persons acting for or on behalf of the State of New York * * * from making any payments or disursements out of State funds pursuant to the provisions of Section 2 of Chapter 414 of the 1972 Laws of New York in payment for or in reimbursement of any tuition payments heretofore or hereafter made to nonpublic elementary and secondary schools."

Notice of Appeal to the Supreme Court of the United States

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated: Albany, New York, November 3, 1972.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendants Nyquist, Levitt and Gallman
By .....
Jean M. Coon
Assistant Solicitor General
Albany, New York 12224
The Capitol
Telephone: 474-7138

To:

Leo Pfeffer, Esq.
Attorney for Plaintiffs
15 East 84th Street
New York, New York 10028

Davis, Polk & Wardwell, Esqs.
Attorneys for Intervenor-Defendants Boylan, Cherry, Ducey, Ferguson, Ferrarella, Roos and Ruiz
1 Chase Manhattan Plaza
New York, New York 10005

John F. Haggerty and Louis P. Conigula, Esqs.
Attorneys for Intervenor-Defendant Brydges
Suite 2400
270 Broadway
New York, New York 10007

APPENDIX "E"

Chapter 414, Laws 1972

An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of law income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings.

Approved May 22, 1972, with an immediate effective date, except that sections 7, 8 and 9 were effective July 1, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The education law is hereby amended by adding thereto a new article, to be article twelve, to read as follows:

ARTICLE 12

HEALTH AND SAFETY GRANTS FOR NONPUBLIC SCHOOL CHILDREN

Section 549. Legislative findings.
550. Definitions.
551. Apportionment.
552. Applications, reports, regulations.
553. Installments.

§ 549. Legislative findings. The legislative hereby finds and declares that:

1. The state has a primary responsibility to ensure the health, welfare and safety of children attending both public and nonpublic schools.

2. The state discharges this responsibility to public school children through substantial amounts of per public financial assistance to local school districts. The fiscal crisis in nonpublic education, however, has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children, particularly in urban areas. Such areas are generally identified by a high incidence of families receiving assistance to dependent children and deteriorating physical structures, including nonpublic school buildings. Financial resources necessary to properly maintain and repair such buildings are beyond the capabilities of low-income people whose children attend nonpublic schools.

3. In recognition of the financial plight of urban areas in attracting qualified teachers, the federal government has enacted Title IV of the Higher Education Act of nineteen hundred sixty-five, which provides incentives to teachers to instruct in those schools which serve a high concentration of students from low-income families.

4. It is incumbent upon the state to ensure that the physical environment in such Title IV areas is both healthy and safe. Incidental to such goads, but none the less signif- and safe. Incidental to such goals, but none the less significant, is the contribution that a healthy and safe school environment makes to the stability of urban neighborhoods.

5. To insure a healthy and safe school environment for children attending nonpublic schools, the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.

Chapter 414, Laws 1972

§ 550. Definitions. In this article:

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit elementary or secondary school in the state of New York, other than a public school, which (a) is providing instruction in accordance with article seventeen and section thirty-two hundred four of this chapter, (b) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U.S.C. § 2000 (d), (c) which is entitled to a tax exemption under section five hundred one (a) and five hundred one (c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended, and (d) has been designated during the base year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425).

3. "Base year" shall mean the school year immediately preceding the current year.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this article.

5. "Health, welfare and safety grants" shall mean the apportionment made pursuant to this article which shall be used for the maintenance and repair of nonpublic school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.

6. "Maintenance and repair" shall mean the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the helath, welfare and safety of enrolled pupils.

7. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils in grades one through twelve during the base year, divided by the number of days the school was in session during such year.

§ 551. Apportionment. 1. In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.

2. The apportionment pursuant to this section shall be reduced by one one hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinary adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 552. Applications, reports, regulations. Each qualifying school which seeks an apportionment pursuant to this article shall submit to the commissioner an application therefor, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this acticle. Such applications shall include an audited statement of the expenditures of maintenance and repair of such qualifying school for the base year.

§ 553. Installments. The amount to be apportioned to a qualifying school in any current year shall be paid in two equal installments, the first to be made on or before January fifteenth and the other not later than June fifteenth of such year, except that for the school year commencing July

first, nineteen hundred seventy-one such apportionment shall be made in one payment on or before June fifteenth, nineteen hundred seventy-two. The commissioner may provide for later payments for the purpose of adjusting and correcting apportionments. The amount to be apportioned to a qualifying school shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§2. Such law is hereby amended by inserting therein a new article, to be article twelve-A to read as follows:

ARTICLE 12-A

ELEMENTARY AND SECONDARY EDUCATION OPPORTUNITY PROGRAM

Section 559. Legislative findings
560. Short title.
561. Definitions.
562. Tuition reimbursement payments to parents.
563. Commissioner; powers.

§ 559. Legislative findings. The legislative hereby finds and declares that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.

3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.

4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the sate in providing a quality education for all children and in nurturing a pluralistic society.

5. An Elementary and Secondary Education Opportunity Program is hereby established, which consists of tuition reimbursement for parents of low income, in order to provide partial assistance in meeting the financial burden of supporting the compulsory education of their children who are full-time students in New York nonpublic elementary and secondary schools.

Chapter 414, Laws 1972

§ 560. Short title. This article shall be known as the "Elementary and Secondary Education Opportunity Program".

§ 561. Definitions. The following terms, whenever used in this article, shall have the following meanings:

a. "Parent" means a legal resident of the state of New York with a New York taxable income of under five thousand dollars who is a parent, stepparent, adoptive parent and the spouse of an adoptive parent of a pupil enrolled in a nonpublic school, or a resident with such taxable income standing in loco parentis to such pupil.

b. "Taxable income" means the amount of combined net taxable income, if any, of both parents computed in accordance with the provisions of section six hundred eleven of the tax law computed without the benefit of the modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph (14) of subsection (c) of section six hundred twelve of the tax law, for the year for which a tuition reimbursement payment is sought. If the parents of a pupil are living apart, the taxable income of the parent who claims reimbursement under this article shall be based upon the taxable income of that parent with whom the pupil is living, or who exercises custody if the pupil is a minor, or would exercise custody if the applicant were a minor and any appropriate payments for the support of the pupil from the other parent.

c. "Nonpublic school" means any nonprofit elementary or secondary school in the State of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred

four of this chapter, (ii) has not been found to be in violation of Title VI Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000 (d), and (iii) which is entitled to a tax exemption under section five hundred one(a) and five hundred one(c)(3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended.

d. "Tuition" means the amount actually paid by a parent for the enrollment of a pupil at a nonpublic school for the calendar year for which a tuition reimbursement payment is sought.

e. "Pupil" means a resident of the state of New York who has been enrolled full-time in a nonpublic school and whose parents' combined taxable income is less than five thousand dollars.

f. "Commissioner" means the commissioner of education of the State of New York.

g. "Regular school year" means all of the months of the calendar year exclusive of July and August.

§ 562. Tuition reimbursement payments to parents. 1. Upon the filing by a parent of the verified statement as required by subdivision two, the commissioner shall make a tuition reimbursement payment to such parent for tuition expenses made in the preceding calendar year. Only one such payment shall be made on behalf of any pupil in a calendar year. Such payment shall be the lesser of either (a) fifty percent of the tuition paid by the parent during the preceding calendar year for the elementary or secondary education of each pupil, or (b) five dollars per month for the period of enrollment in a nonpublic school during the regular school year for each pupil in grades one

through eight, and ten dollars per month for the period of enrollment in a nonpublic school during the preceding regular school year for each pupil in grades nine through twelve. Whenever payments as herein computed total less than ten dollars, no such payment shall be made.

2. In order to be eligible for tuition reimbursement hereunder, the parent of a pupil shall, by May first of the year following the calendar year for which reimbursement is sought, file with the commissioner a verified statement, in such form as he shall provide, stating that the pupil was enrolled during such year in a nonpublic school or schools and, in addition, the following information: (a) the name, address and taxable income of the parent; (b) the name, address and birth date of the pupil; (c) the grade in which the pupil was enrolled during each month in a nonpublic school in such year; (d) the name and address of the nonpublic school or schools attended by such pupil; (e) a receipted tuition bill. For reimbursement for the calendar year nineteen hundred seventy-one, such verified statement shall be filed not later than July first, nineteen hundred seventy-two.

3. No parent shall be eligible to receive a tuition reimbursement payment who has claimed a modification of federal adjusted gross income for nonpublic school tuition pursuant to paragraph fourteen of subsection (c) of section six hundred twelve of the tax law based upon the same tuition expenditures.

4. The state tax commission shall, when requested by the commissioner, compare any verified statement filed with the commissioner pursuant to this article with the state income tax returns if any, filed by the parent making such verified

tatement and shall report any discrepancies to the commissioner. All verified statements filed with the commissioner and all reports made to him by the state tax commission, pursuant to this article shall be deemed confidential nd, except in accordance with proper judicial order or as otherwise prescribed by law, it shall be unlawful for the ommissioner or any officer or employee of the department o divulge or make known in any manner the amount of ncome or any other particulars set forth in any verified tatement filed with him hereunder or report made to him ursuant to this subdivision; but nothing contained herein hall be considered to prohibit the commissioner's publicaion of statistics so classified as to prevent the identification f particular affidavits or reports.

§ 563. Commissioner; powers. The commissioner shall ave responsibility for the administration of the program reated by this article and may promulgate such regulations s are necessary to carry out the provisions of this article. The amount required to be paid under the provisions of this rticle shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner in the manner provided by law.

§ 3. Legislative findings. The legislature hereby finds and declares that:

1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.

2. Nonpublic educational institutions are themselves entitled to a tax exempt status by virtue of legislation which has been sustained by the courts.

3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children.

4. Tax laws also authorize deductions for education related to employment.

5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law.

§ 4. Subsection (c) of section six hunded twelve of the tax law is hereby amended by adding thereto a new paragraph, to be paragraph fourteen, to read as follows:

(14) The amount that may be subtracted from federal adjusted gross income pursuant to subsection (j) of this section.

§ 5. Section six hundred twelve of such law is hereby amended by adding thereto a new subsection, to be subjection (j), to read as follows:

(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades

one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York adjusted gross income is:	*The amount allowable for each dependent is:*
Less than $9,000	*$1,000*
9,000—10,999	*850*
11,000—12,999	*700*
13,000—14,999	*550*
15,000—16,999	*400*
17,000—18,999	*250*
19,000—20,999	*150*
21,000—22,999	*125*
23,000—24,999	*100*
25,000 and over	*–0–*

(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

(3) Definitions. (A) "Tuition", as used in this subsection, shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

(B) "Nonpublic school", as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252,42 U. S. C. § 2000 (d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) (3) of the Federal Internal Revenue Code of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state tax commission may require.

(C) "Regular school year" as used in this subsection shall mean the months of the taxable year exclusive of July and August.

(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require.

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils,

the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps , fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

§ 7. Section thirty-six hundred two of the education law is hereby amended by adding thereto a new subdivision, to be subdivision fifteen, to read as follows:

15. Impacted aid. In addition to the foregoing apportionments there shall be apportioned to any school district which experiences an increase in student enrollment during the school year commencing July first, nineteen hundred seventy-two or any year thereafter because of the closing in whole or in part of a nonpublic school, or campus school, an amount computed as herein provided.

a. Definitions. As used herein:

1. enrolled student shall mean any student currently enrolled in a public school of any school district or borough who attended a nonpublic school, or campus school during either the base year or current year and whose enrollment in such public school was caused by the closing in whole or in part of a nonpublic school.

2. borough shall mean any borough of the city school district of the city of New York.

3. aid ratio shall mean the higher of the actual aid ratio established for such district or borough, or thirty-six per centum.

b. Computation. The amount to be apportioned shall be the product of:

1. the number of enrolled students in any school district or borough multiplied by one hundred dollars; and

2. the aid ration of such school district or borough.

c. The city school district of the city of New York shall be entitled to compute such apportionment using the enrolled students and aid ration for each borough.

d. Any apportionment as herein computed shall be subject to regulations promulgated by the commissioner and shall not be deducted in determining approved operating expenses of the district for the purpose of computation of any apportionment pursuant to subdivision five of this section.

e. The apportionment as herein computed shall be paid in accordance with the provisions of section thirty-six hundred nine of such law during the current school year next succeeding such year.

§ 8. Subdivisions one, two and three of section four hundred eight of the education law, subdivision one having been last amended by chapter two hundred fifty-seven of the laws of nineteen hundred sixty-five, subdivision two having been amended by chapter nine hundred thirty-three of the laws of nineteen hundred seventy-one, and subdivision three having amended by chapter seven hundred eighty-one of the laws of nineteen hundred fifty-one, are hereby amended to read, respectively, as follows:

1. No schoolhouse shall be erected, *purchased,* repaired, enlarged or remodeled in any school district except in a city school district in a city seventy thousand inhabitants or more, at an expense which shall exceed one hundred thousand dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval endorsed thereon. Such plans and specification shall show in detail the ventilation, heating and lighting of such buildings.

In the case of a school district in a city having seventy thousand inhabitants or more, all the provisions previously set forth in this subdivision shall apply, except that the commissioner may waive the requirement for submission of plans and specifications and substitute therefor the requirement for submission of an outline of such plans and specifications for his review. Such outline shall be in a form which he may prescribe from time to time.

In either case, the commissioner may, in his discretion, review plans and specifications for projects estimated at an expense of less than one hundred thousand dollars.

In the case of a school district in a city having a million inhabitants or more, all of the provisions previously set

forth in this subdivision shall apply, except that such school district shall only be required to submit an outline of the plans and specifications to the commissioner of education for his information where a schoolhouse is to be erected in conjunction with the development of a project to be developed under the provisions of article two or five of the private housing finance law and where both the school and the project are to have rights or interests in the same land, regardless of the similarity or equality thereof, including fee interests, easements, space rights or other rights or interests.

2. The commissioner of education shall not approve the plans for the erection *or purchase* of any school building or addition thereto or remodeling thereof unless the same shall provide for heating, ventilation, lighting, sanitation, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein and unless the county superintendent of highways or commissioner of public works has been advised of the location of all temporary and permanent entrances and exits upon all public highways and the storm drainage plan which is to be used.

3. The commissioner of education shall approve the plans and specifications, heretofore or hereafter submitted pursuant to this section, for the erection *or purchase* of any school building or addition thereto or remodeling thereof on the site or sites selected therefor pursuant to this chapter, if such plans conform to the requirements and provisions of this chapter and the regulations of the commissioner adopted pursuant to this chapter in all other respects; provided, however, that the commissioner of

education shall not approve the plans for the erection *or purchase* of any school building or addition thereto unless the site has been selected with reasonable consideration of the following factors; its place in a comprehensive, long-term school building program; area required for outdoor educational activities; educational adaptability, environment accessibility; soil conditions; initial and ultimate costs.

§ 9. Section four hundred eight of such law is hereby amended by adding thereto a new subdivision, to be subdivision six, to read as follows:

6. The commissioner may promulgate regulations relating to the purchase of existing school buildings. Such regulations shall provide for an appraisal of such buildings as school buildings and the land on which they are situated as school sites by the state board of equalization and assessment, such estimates of the cost of renovation and construction as may be necessary and limitations on the cost of acquisition and renovation, in taking into consideration the age and condition of such existing buildings, in relation to the estimated cost of constructing a new building containing comparable facilities. Such regulations may also require the prior approval of the commissioner of any renovations proposed to be made to such existing school buildings.

§ 10. The opening paragraph and paragraph a of subdivision six of section thirty-six hundred two of such law, the opening paragraph having been separately amended by chapters eight hundred forty-seven and nine hundred thirty-one of the laws of nineteen hundred seventy-one and paragraph a having been amended by chapter two

hundred thirty-four of the laws of nineteeen hundred seventy, are hereby amended to read, respectively, as follows:

Apportionment for capital outlays and debt service for school building purposes. Any apportionment to a school district pursuant to this subdivision shall be based upon base year approved expenditures for capital outlays from its general fund, capital fund or reserved funds and current year approved expenditures for debt service and lease or other annual payments to the New York city educational construction fund created by article ten of this chapter or the city of Yonkers educational construction fund created by article ten-B of this chapter which have been pledged to secure the payment of bonds, notes or other obligations issued by the fund to finance the construction, acquisition, reconstruction, rehabilitation or improvement of the school portion of combined occupancy structures, or for lease or other annual payments to the New York state urban development corporation created by chapter one hundred seventy-four of the laws of nineteen hundred and sixty-eight, pursuant to agreement between such school district and such corporation relating to the construction, acquisition, reconstruction, rehabilitation or improvement of any school building. In any such case approved expenditures shall be only for new construction, reconstruction, *purchase of existing structures*, for site purchase and improvement, for new garages, for original equipment, furnishings, machinery, or apparatus, and for professional fees and other costs incidental to such construction or reconstruction, *or purchase of existing structures.*

a. For capital outlays for such purposes first incurred on or after July first, nineteen hundred sixty-one and debt service for such purposes first incurred on or after July first, nineteen hundred sixty-two, the actual approved expenditures less the amount of civil defense aid received pursuant to the provisions of section thirty-five of the laws of nineteen hundred fifty-one as amended shall be allowed for purposes of apportionment under this subdivision but not in excess of the following schedule of cost allowances:

(1) For new construction *and the purchase of existing structures* the cost allowances shall be based upon the rated capacity of the building or addition and shall be not more than one thousand dollars per pupil for a building or an addition housing grades kindergarten through six, nor more than fourteen hundred dollars per pupil for a building or an addition housing grades seven through nine, nor more than fifteen hundred dollars per pupil for a building or an addition housing grades seven through twelve. Rated capacity of a building or an addition shall be determined by the commissioner based on space standards and other requirements for building construction specified by the commissioner. Such allowances shall be corrected by an index number established by the commissioner reflecting changes in the cost of labor and materials from December first, nineteen hundred fifty.

(2) Where a school district has expenditures for site purchase, grading or improvement of the site, original furnishings, equipment, machinery or apparatus, or professional fees, or other incidental costs, the cost allowances for new construction *and the purchase of existing structures*

may be increased by the actual expenditures for such purposes but by not more than twenty per centum for school buildings or additions housing grades kindergarten through six and by not more than twenty-five per centum for school buildings or additions housing grades seven through twelve.

(3) Cost allowances for reconstructing or modernizing structures shall not exceed fifty per centum of the cost allowances for new construction.

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 12. This act shall take effect immediately, except that sections seven, eight and nine shall take effect July first, nineteen hundred seventy-two, and the provisions of paragraph (14) of subsection (c) of section six hundred twelve of the tax law, as added by section four of this act, shall apply to all taxable years beginning after December thirty-first, nineteen hundred seventy-one.